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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1846

LINCOLN THEODORE PERRY,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
XEROX CORPORATION, AND
INDIANA BROADCASTING CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming summary judgment for respondents in a defamation action where the petitioner was a public figure, where the alleged defamatory commentary related solely to public performances by petitioner, and where there was no showing of actual malice in the preparation of the commentary.

STATEMENT OF THE CASE

Petitioner is the black entertainer, actor, and movie star known as "Stepin Fetchit", who made his career performing in minstrel shows, vaudeville and motion pictures. He starred in his first movie in 1925 and during the next 13 years starred in at least 33 other movies. He left motion pictures in 1938 during a contract dispute. He nonetheless continued to entertain at "picture clubs, fairs, radio shows, road shows, night clubs, opera houses, supper clubs, minstrel shows, vaudeville, medicine shows, Broadway shows, and on television." (Pet. App. A5) At the time of his deposition in April, 1972, his most recent appearance as an entertainer had been in 1970, and as a movie actor in 1972, when he had a role in a pilot film for a television series. As petitioner summarized his notoriety and success in his deposition:

> "I became a household word. I elevated the Negro and I became a Hollywood motion picture star, and this was during the time that a Negro couldn't ride in the front of a bus, couldn't go in no white restaurant, in no white hotels. This was north and south. California and every place." (Pet. App. A5)

Beginning July 2, 1968, CBS News broadcast a seven-part documentary series entitled "Of Black America," with "Black History: Lost, Stolen or Strayed" as its first part. Xerox Corporation sponsored it and it was televised in Indianapolis by WISH-TV. The series, which dealt with black history and culture and the black experience in America, explored the history of race relations in this country and sought some understanding of the racial strife that was then ripping the nation apart.

"Black History: Lost, Stolen or Strayed" (hereafter "the telecast") attempted, in part, to relate factually how badly blacks had been treated in history books and portrayed in movies.

The telecast was narrated by Bill Cosby and it initially acquainted viewers with little known or appreciated facts regarding contributions of blacks to our historical and cultural heritage. It then focused on the treatment of blacks on the movie screens.

In the preface of the segment which dealt with treatment of blacks in movies, Cosby stated:

> "In the past fifty years, 33,000 feature films have been made in the United States, and about 6,000 of them have had parts for black actors. For the most part, the black portraits have been drawn by white writers, white producers, and white directors for a white audience.
>
> "Most black parts were the way white Americans wanted them to be. The black male was consistently shown as nobody, nothing. He had no qualities that could be admired by any man, or more particularly, by any woman." (Pet. App. A2)

Several famous black actors were mentioned in the segment including Bert Williams, Bill "Bojangles" Robinson, Willie Best and petitioner. The following narrative by Cosby was interspersed with clips from films made by petitioner:

> "The tradition of the lazy, stupid, crap-shooting, chicken-stealing idiot was popularized by an actor named Lincoln Theodore Monroe Andrew Perry. The cat made two million dollars in five years in the middle thirties. And everyone who ever saw a movie laughed at—Stepin Fetchit."
>
> * * * * *
>
> "It's too bad he was as good at it as he was. The character he played was planted in a lot of people's heads and they remember it the rest of their lives as clear as an auto accident."
>
> * * * * *
>
> "He played in movies with other actors who were as American as Mom's raspberry jello. If they accepted the stereotype, how wrong could it be?" (Pet. App. A2-A3)

As a result of the telecast, petitioner brought this diversity action in the United States District Court for the Southern District of Indiana against the Columbia Broadcasting System, Inc., Xerox Corporation and the Indiana Broadcasting Corporation (which owns and operates WISH-TV).[1] He alleged defamation and invasion of privacy because the telecast included unaltered excerpts from movies in which he portrayed the character Stepin Fetchit and because of the above-quoted commentary on that type of role.

After full discovery, including respondents' answers to sets of detailed interrogatories, inspection of all documents used in preparing the telecast, and depositions of the CBS personnel involved in the telecast's preparation, both sides filed motions for summary judgment. The district court found no genuine issue on any material fact and concluded that there was neither a defamation nor an invasion of privacy. Accordingly, it granted respondents' motion. It held in the alternative that since petitioner was a public figure involved in issues of public interest and since there was no evidence that the telecast was made with knowledge of falsity or with reckless disregard of the truth, respondents' comment on petitioner was constitutionally permissible.

On appeal, the court of appeals held that a jury could reasonably have found "the intended meaning of the commentary was the [petitioner] had sold out his race for money", defamation under Indiana law, as easily as that petitioner's "excellent character portrayal reinforced the stereotype view that many white persons had of blacks during the nineteen-thirties and that white movie-goers were willing to pay two million dollars for that reinforcement." Thus, absent consideration of *New York Times Co.* v. *Sullivan, infra,* a jury question had been presented on the issue of defamation.

The court agreed with the district court, however, that petitioner was, and continued to be until the telecast, a public figure,

1. Twentieth Century-Fox was also named in the complaint, but it was dismissed on petitioner's motion.

that the commentary dealt with his public role as an actor, and that the subject of the telecast, the stereotyped, erroneous characterization of blacks in films, was a matter of public interest. Accordingly, relying on *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny, the court held that the First Amendment prohibited an action for defamation in the absence of proof of actual malice. Since the district court made lengthy findings as to the detailed research that went into the production of the telecast and found the evidence to be uncontradicted that respondents had no knowledge of falsity nor that they acted in reckless disregard of the truth, the district court's grant of the respondents' motion for summary judgment was affirmed.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

The Court of Appeals Correctly Applied Settled Principles Enunciated by This Court and Its Decision Is Not in Conflict With a Decision of Any Other Court.

On undisputed evidence the district court determined that petitioner was a "public figure". (Pet. App. A5) That determination was affirmed by the court of appeals, relying on *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), which noted, *inter alia*, that he was by his own admission, and that he continued to be by his recent show business activities, a "public figure". (Pet. App. A5, A7)[2] Both the evidence and his own statements demonstrating "the notoriety of [petitioner's acting] achievements" and "the vigor and success with which [he has sought] the public's attention," see *Gertz* v. *Robert Welch, Inc.*, ... U.S. ....., ... (1974), class him as a public figure —in his own words, a "household word." Indeed his petition

2. This unchallenged finding distinguishes the instant case from *Gertz* v. *Robert Welch, Inc.*, ... U. S. ..... (1974). In that case the district court held that a reputable lawyer who was representing a civil litigant in an action against a policeman was not a public figure. On appeal, the finding was not overturned and this Court agreed that the district court had not erred in its finding.

reasserts his public status, stating that the character Stepin Fetchit "is universally loved, and is equally well known, with a white skin, as Charlie Chaplin, Lou Costello, Stan Laurel. . . ." (Pet. 10) Petitioner does not now contend, and he can point to neither evidence nor case authority indicating, that he is anything but a "public figure."

Thus, this is not a case of a private individual being catapulted into the public's eye at the direction of an invidious press. Rather, in furtherance of, and as part of, his career, petitioner has thrust himself into the public view, inviting attention and comment, and exposing himself to the risk of injury from non-malicious defamatory falsehoods. See, *Gertz* v. *Robert Welch, Inc., supra* at .....

The commentary of which petitioner complained related solely to his movie career and to statements he had made to the press. (Pet. App. A6) Further, the issue of the treatment of blacks in American movies was held to be of interest to the public. *Cf., Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). (Pet. App. A6) Petitioner does not quarrel with the holdings of the lower courts on either of these issues.

Having made these determinations, both courts applied the *New York Times Co.* v. *Sullivan* standard of "actual malice" to the writing of the commentary in determining whether petitioner was entitled to a recovery for the allegedly defamatory statements. On uncontradicted evidence the district court found that respondents, their agents and their employees believed everything in the telecast to be true; that they broadcast the telecast only after (a) having employed qualified writers and scholars to prepare the script, (b) completing substantial research and (c) verifying their conclusions by resort to primary resources; and that the telecast was not made with reckless disregard of the truth.[3] Accordingly, both courts held that even were there a

3. Nothing was presented to the court of appeals to refute the district court's detailed findings. (Pet. App. A8) And the sole challenge to them in this petition is the unsubstantiated, inconsistent assertion that "CBS . . . did only such research essential to its commentary with callous disregard for actual facts." (Pet. 8)

defamation, petitioner could not recover since he had failed to meet his burden of proving "actual malice". *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Nowhere in his petition does petitioner contend the decisions of the courts below conflict with decisions of this Court or any other court. In light of this Court's recent reaffirmation of the *New York Times Co.* v. *Sullivan* privilege in the context of public figures, *Gertz* v. *Robert Welch, Inc., supra*, no such contention could be fruitful.

Petitioner contents himself with asserting his view of the differences between "baseless commentary", "editorialization" and "news". He complains of what he views as damaging commentary which related to his movie performances, not misstatements of fact. As reiterated by this Court,

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc., supra* at ____.

Petitioner's primary contention, that the telecast's commentary constitutes actionable defamation even in the absence of a showing of "actual malice", would emasculate this fundamental protection afforded diverse opinions by the First Amendment.

Finally, petitioner attempts an irrelevant comparison of First and Seventh Amendment rights with no case citation and the barest of reference to the Amendments. Petitioner received his day in court, contrary to his assertions, having participated in full discovery and being unable to survive fully-briefed and argued cross-motions for summary judgment. That he was unable to provide enough, indeed any, evidence with respect to "actual malice" on the part of respondents in the preparation of the telecast does not mean, as he contends, that he was denied any rights to trial guaranteed by the Fifth or Seventh Amendments.

CONCLUSION

Petitioner has failed to demonstrate that the decision of the court of appeals conflicts with decisions of other courts of appeals or with any decisions of this Court. Since the lower courts applied settled and recently reaffirmed principles, he has failed to establish that any important question is presented for determination by this Court. For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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